

Message Text

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ACTION XMB-04

INFO OCT-01 AF-06 ISO-00 EB-07 COME-00 TRSE-00 OPIC-06

AID-05 INT-05 L-03 /037 W

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FM AMEMBASSY ACCRA

TO SECSTATE WASHDC PRIORITY 9005

UNCLAS ACCRA 5734

E.O. 11652: N/A

TAGS: ETRD, US, GH

SUBJ: VOLTA ALUMINIUM CO. LTD. (VALCO) EXIM CREDIT 5431

REFS: (A) ACCRA 4563 (B) STATE 175691 (C) STATE 206551

1. LETTER QUOTED BELOW DATED AUG. 29 FROM DEPUTY ATTORNEY GENERAL ASANTE TO EXIMBANK COUNSEL GAINER RECEIVED AT EMBASSY COB AUG. 29.

2. REFTEL C RECEIVED AUG. 30. TEXT TRANSCRIBED AND WILL BE DELIVERED TO ASANTE MORNING SEPT. 1, SINCE ALL GOG OFFICES CLOSED FOR WEEKEND. EMBASSY'S TRANSMITTAL LETTER EXPLAINS THAT TEXTS OF TWO LETTERS CROSSED.

3. ASANTE'S LETTER: BEGIN TEXT. 29TH AUGUST 1975. QUOTE DEAR MR. GAINER, QUOTE YOU WILL RECALL THAT IN OUR RECENT DISCUSSIONS IN WASHINGTON IN RESPECT OF THE PROPOSED GUARANTEE AGREEMENT BETWEEN THE GOVERNMENT OF GHANA AND THE EXPORT-IMPORT BANK, WE WERE UNABLE TO AGREE ON THE PRECISE FORMULATION OF AN EXCULPATORY CLAUSE RELATING TO THE PROSECUTION OF LEGAL REMEDIES AGAINST VALCO IN CONSEQUENCE OF VALCO'S VIOLATION OF ITS OBLIGATIONS OR THE LAWS OF GHANA. IT WAS MY CONTENTION THAT THE TERM "EVENT OF GUARANTEE" IN THE GUARANTEE AGREEMENT SHOULD NOT INCLUDE "ANY ACTION TAKEN PURSUANT TO ANY LEGAL REMEDIES WHICH THE GOVERNMENT OF GHANA OR ANY AGENCY OR POLITICAL SUB-DIVISION OF GHANA MAY HAVE AGAINST VALCO IN CONSEQUENCE OF ANY VIOLATION BY VALCO OF ITS LAWFUL OBLIGATIONS TO THE GOVERNMENT OR ANY AGENCY OR LEGAL SUB-DIVISION OF GHANA OR OF ANY LAWS, DECREES OR REGULATIONS IN FORCE IN GHANA."

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YOU WERE PREPARED TO ACCEPT THIS LANGUAGE SUBJECT TO THE INSERTION

OF THE FOLLOWING WORDS AFTER THE WORD "ACTION": QUOTE "OTHER THAN FOR THE PURPOSES ENUMERATED IN SUB-CLAUSES (I), (II) AND (III) OF CLAUSE 1 ABOVE." (REPEAT: SUB-CLAUSES ROMAN ONE, TWO AND THREE OF CLAUSE ARABIC ONE) I FOUND YOUR PROPOSAL UNACCEPTABLE BECAUSE I CONSIDERED IT SOMEWHAT CIRCUITIOUS. THE MAIN OBJECT OF AN EXCULPATORY CLAUSE IN THE CONTEXT OF THE GUARANTEE AGREEMENT IS TO EXPRESSLY CLASSIFY CERTAIN ACTIONS AS EXCEPTIONS TO THE PROHIBITED EVENTS OF GUARANTEE. THESE EXCEPTIONS IN MY VIEW WOULD BE MEANINGLESS IF THEY WERE MADE SUBJECT TO FURTHER EXCEPTIONS WHICH MERELY REFERRED TO THE PROHIBITED EVENTS OF GURANTEE.

QUOTE. 2. SINCE RETURNING TO GHANA, I HAVE HAD DISCUSSIONS WITH MEMBERS OF THE GOVERNMENT, AND THE GOVERNMENT STILL MAINTAINS THAT IT CANNOT DEPART FROM MY FORMULATION. HOWEVER, TO ASSURE EXIM BANK THAT THE GOVERNMENT HAS NO INTENTION TO USING THIS PROVISION AS A DEVICE FOR NATIONALISATION, EXPROPRIATION, INTERVENTION, ETC., THE GOVERNMENT WOULD SUGGEST THAT, BY WAY OF A COMPROMISE, A PROVISIO SHOULD BE ADDED TO THE ABOVE FORMULATION IN THE FOLLOWING TERMS: QUOTE. "PROVIDED HOWEVER THAT WHERE SUCH ACTION WOULD RESULT IN THE TRANSFER OF OWNERSHIP OF, OR ANY OTHER INTERVENTION IN THE, RIGHTS, PROPERTY OR OTHER INTEREST OF VALCO, THE GOVERNMENT OF GHANA OR THE AGENCY OR POLITICAL SUB-DIVISION OF GHANA, AS THE CASE MAY BE, SHALL GIVE NOTICE OT VALCO IN THAT BEHALF SPECIFYING THE FULL IMPLICATIONS OF THE REMEDIES TO BE PROSECUTED AGAINST VALCO; AND IF WITHIN A PERIOD OF TWO MONTHS OF THE SAID NOTICE VALCO HAS NOT CURED TO REMEDIED THE VILOATIONS IN QUESTION OR PROVIDED APPROPRIATE REDRESS THEREFOR, THE SAID LEGAL REMEDIES WILL BE PROSECUTED TO THE FULLIN ACCORDANCE WITH THE LEGAL PROCESS OF GHANA."

QUOTE. 3. YOU WILL ALSO RECALL THAT IN OUR DISCUSSIONS I INDICATED TO YOU, AND YOU APPEARED TO AGREE, THAT IT WOULD BE PROPER FOR VALCO TO GIVE A GENERAL UNDERTAKING IN THE THIRD CLOSING AGREEMENT TO COMPLY WITH THE LAWS OF GHANA, SUBJECT TO THE PROVISIONS OF THE MASTER AGREEMENT BETWEEN GHANA GOVERNMENT AND VALCO. THIS UNDERTAKING WOULD OF COURSE NOT DEROGATE FROM THE EXEMPTIONS AND IMMUNITIES GRANTED TO VALCO UNDER THE MASTER AGREEMENT, AND WOULD BE SO WORDED AS TO EXCLUDE COMPLIANCE WITH EXPROPRIATORY LEGISLATION OR LEGISLATION OTHERWISE PROVIDING FOR THE PURPOSES ENUMERATED IN SUB-CLAUSE (I), (II) AND (III) OF CLAUSE 1 OF YOUR DRAFT. FOR REASONS WHICH ENTIRELY ESCAPE ME VALCO HAS REFUSED TO UNCLASSIFIED

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GIVE THIS UNDERTAKING, AND I CANNOT OVER-EMPHASIZE THAT THE GHANA GOVERNMENT TAKES AN EXTREMELY SERIOUS VIEW OF THIS RELUCTANCE TO GIVE A PERFECTLY SIMPLY UNDERTAKING OF GOOD CONDUCT. I SHOULD STRESS THAT VALCO'S FAILURE TO GIVE THIS UNDERTAKING WILL MAKE IT EXTREMELY DIFFICULT FOR THE GOVERNMENT OF GHANA TO PROVIDE THE GUARANTEE FOR THE EXIM BANK FINANCING. IT IS THE POSITION OF THE GOVERNMENT OF GHANA THAT THE GOVERNMENT CANNOT BE CALLED UPON TO GIVE ASSURANCES OF GOOD CONDUCT IF VALCO FINDS ITSELF UNABLE TO

GIVE A POSITIVE ASSURANCE THAT IT WILL COMPLY WITH THE LAWS OF
GHANA. QUOTE. YOURS SINCERELY, /S/ S.K.B. ASANTE, DEPUTY ATTORNEY-
GENERAL" END TEXT.

4. ASANTE'S LETTER BEING POUCHED. COMMENTS SEPTTEL.
LINEHAN

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